IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 440

MAX GOLDBERG,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY.

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The Questions Were Accurately Presented in the Petition and Are Inaccurately Presented by the Respondent.

Respondent did not point out anywhere in what respect the questions presented by the Petitioner are not accurately substantiated by the Record, but instead substituted different "questions presented," which are *inaccurate* and *misleading.*

The first "question presented" by the Respondent (p. 2), whether Petitioner was one of the real or beneficial pro rata owners of 930 shares of bank stock "purchased with funds subscribed by 36 persons under the terms of a Trust" and registered in the name of a nominee, is *inaccurate* and *misleading* for the reason that *at no time did 36 persons*

subscribe to the shares of stock. The 36 persons *subscribed to shares of a valid Trust* under the Illinois law, and by their subscription to the shares of the Trust, they were entitled to participate in the proceeds realized from *all* of the securities which the Trust owned to be distributed by the Trustees of the Trust whenever they would declare such distribution. The Trust owned the 930 shares, *together with other securities,* and the 36 persons were *never subscribers to the bank stock* and were neither the beneficial owners nor the registered owners thereof. The real question, therefore is, as stated in the Petition under the admitted facts, whether shareholders of a valid Trust are the real or beneficial owners of bank stock which the Trust purchased in the name of its nominee, and which it held among its other securities prior to the distribution of any of its securities to the shareholders, and whether such shareholders of a Trust may be held individually liable as alleged actual owners of bank stock, as held in the Opinion below.

The second "question presented" by the Respondent, whether an actual and beneficial owner of Illinois bank stock can contractually "insulate" himself through a Trust from the liability provided by the Illinois Constitution and Statutes, is not involved because Petitioner was never an "owner" and did *not* subscribe to bank stock, and it was, therefore, not necessary for him to "insulate" himself from any liability. Petitioner *merely became an investor in a valid Trust,* which *Trust subscribed* to the bank stock in the name of its nominee.

The questions were concisely and accurately presented in the Petition (pp. 6-8). These questions, under the admitted facts, *and the absence of any authorities to sustain the decision below,* call for a review of the decision by the issuance of the Writ.

Respondent's "Statement" Is But a Repetition of Petitioner's Statement and Is Inaccurate in One Respect.

The "statement" of the Respondent as it appears on Page 5, as to the admitted facts, is but a repetition of Petitioner's statement, but is *inaccurate* as to Point 5 that it was admitted that Respondent's note "remained unpaid." This admission was made June 4, 1942 (R. 52) but on November 24, 1943, Petitioner obtained leave of Court to file an Amended Answer, and such Amended Answer (R. 87) *denied* that there was an unpaid balance due to the Respondent and demanded strict proof and this presented a *factual* issue.

Respondent's "Argument" Is Silent on the Primary Questions Presented by the Petition, Is Evasive and Unsupported by Any Authorities.

Respondent's Brief is *silent* on the main point decided below, that shareholders of a valid Trust are individually liable for the purchase of bank stock by the Trust in the name of its nominee where the individual shareholders never received any of the dividends and the dividends were at all times payable to the Trust and where the local law adjudicated that the Trust was valid as an entity to *exempt* the shareholders from personal liability. This was discussed under Point I in Petitioner's Brief (pp. 22-34) under sub-division (a)—(1), (2), (3), (4) and (5). *Not a single authority is cited in* Respondent's Brief to sustain the decision below on this primary point and the reason is obvious. Such authorities are not to be found.

Petitioner has shown in his Brief (pp. 23, 25) that the decision below *runs counter* to the latest decision of this Court on this point, as well as to the decisions of other Circuits. The *silence* of the Respondents on this point

constitutes an *admission* that the decision is irreconcilable with the views of this Court and with the views of other Circuits.

Respondents nowhere discuss the Petition chronologically. Its argument is independently stated under five points, some of which do not even call for a reply. We will discuss them in their chronological order.

1. No reply is necessary to the statement of the Respondent that the admitted facts establish the Petitioner as one of the real, actual and beneficial owners of the bank stock. The question whether Respondent was the real, actual and beneficial owner of the bank stock can only be answered upon a consideration of the authorities dealing with the question whether shareholders of a valid Trust are the actual owners of the securities held by the Trust and that the Trustees of the Trust are not the owners, and this point which was fully argued in the Petition was not even mentioned in the Respondent's Brief.

2. It is not a fact that the Supreme Court of Illinois has declared that the statutory liability "will *also* fall upon the real owner" and even if this were true it would not overcome the other declaration of the same Court in *Hood* v. *Commonwealth Trust & Savings Bank*, 376 Ill. 413, which Respondent cites (p. 8) on the point that the question as to who is the real owner "is not a constitutional question" but is "a factual question" and is determined by the *intention* of the parties to become such owner, and when "there is no intention" to become the owner of the stock, *no statutory liability may be imposed*, as shown in Petitioner's Brief (pp. 37-40). The Illinois Supreme Court never held that the statutory liability "will *also* fall upon the real owner" but held that it will fall on the real owner. There is *no dual liability* under the Illinois authorities. There is only *one* liability, as held in *Capetti*

v. *Allborg,* 319 Ill. App. 643, quoted in Petitioner's Brief (p. 53).

The assertion (p. 8) that Petitioner "admits" that "his subscription of $100,000.00" together with funds subscribed by other shareholders "was used to purchase the bank stock in the name of the nominee, Martin" is *completely without basis* as there is no such admission and it is *not a fact.* Petitioner's subscription of $100,000.00 was *not to any bank stock* but he subscribed *to the shares of the Trust* which were issued to him and so did the other subscribers. None of them ever subscribed or purchased any of the bank stock. The bank stock was purchased by the Trustees of the Trust as an investment together with other securities and was placed in the name of its agent under the Trust Agreement. This does not make the Petitioner a subscriber to the bank stock.

Respondent seems to *concede* (p. 9) that the decision in *Martin* v. *Central Trust Company,* 327 Ill. 622, cited in the Petition in Pages 27-28, and the decision in *Rittenberg* v. *Murnighan,* 381 Ill. 267, cited in the Petition in Pages 29-31 sustain Petitioner's contention that under the Illinois law stockholders in a corporation or in a Trust are not the owners of securities purchased by the corporation or Trust, and that there is no distinction under the Illinois law between a corporation and a Trust insofar as it relates to the *title,* but it says that "neither of the two cases involves liability of a stockholder in an insolvent bank." The distinction is *fallacious* because the point involved is *not* the particular creditor to whom the party is indebted but the *principle establishing the liability* and if it is true as conceded that in those two cases the Illinois Supreme Court has adjudicated that *ownership of stock by a corporation of a Trust does not vest the ownership in the shareholders* but places the ownership in the corporation or Trust, then *it must follow as the legal consequence that*

shareholders of a Trust are not owners of the stock owned by the Trust. Not a single case was cited by the Respondent on the main proposition that shareholders of a valid Trust are liable for stock purchased by the Trust. The reason is apparent. No Court ever advanced such a far-fetched theory.

In discussing the law as announced in *Schumann-Heink* v. *Folsom,* 328 Ill. 321, on the point that shareholders of a valid Trust are not individually liable, *regardless of whether or not they exempted themselves from personal liability,* Respondent says (p. 9) that Petitioner "ignores his dual position as a member and Trustee of a syndicate" and contends that this distinguishes the *Folsom* case. That Respondent did not rely on this *dual* position when it commenced the action and prosecuted the case appears from its Complaint when *it sued shareholders who were not in such dual position* (R. 35-36). The law does not prohibit a Trustee of a Massachusetts Trust from being a shareholder.

The contention that the liability against Petitioner was based "upon the contract imposed by the Constitution and Statutes of Illinois" is without any foundation for the reason that *the Constitution did not impose any contract upon the Petitioner* and the question whether Petitioner was liable must be determined by the answer whether he was the registered or beneficial owner of the stock, and where he was neither the registered owner nor beneficial owner, there was no contract under which any liability may be imposed. The only case upon which Respondent relies (p. 10) is the decision in *Review Printing & Stationery Co.* v. *McCoy,* 291 Ill. App. 524, which was cited by the Court of Appeals. This decision was discussed in Petitioner's Brief (p. 33) and no further reply is necessary.

Respondent refers (p. 12) to the authorities cited in the Petition on the point that it is the public policy of Illi-

nois not to hold a Trustee personally liable for the debts of a Trust Estate but says that they have "no application to the issues presented here." A mere reading of the decision in *United States* v. *Earling*, 39 F. Supp. 864, is sufficient to refute this contention.

Respondent says that the decision in *Flanagan* v. *First National Bank of Chicago*, 307 Ill. App. 495, merely held it was *ultra vires* for a bank to subscribe individually to bank stock and that the issue that the liability of the bank was that of Trustee and not individually was based upon the *ultra vires* act. A mere reading of the decision will convince this Court that this is incorrect.

Respondent contends (p. 13) that the decisions cited in the Petition at Pages 38-40 are not in conflict with the decision below. This is but a bare statement. The decisions that were cited there, are on the point that the question as to "who is a stockholder" is *not* a *constitutional* question but is a *factual* question. At Page 39, we cited the Illinois decisions on the point that the question whether one is an owner of stock is a question of "intention" and "*no presumption arises*" that a person intended to become the real owner of the stock by the fact that he became either Executor or Trustee. These decisions are squarely *in conflict* with the decision below, and Respondent has not shown how they can be reconciled with the decision in the instant case. The bare statement (p. 13) that the cases cited at Pages 41-43 of the Petition are distinguishable does not establish that they are distinguishable.

3. It is unnecessary to burden this Court with a reply to Point 3 which was fully discussed in Petitioner's Brief (pp. 49-58) and we have shown that the decisions of the Federal Courts do not apply to the liability under the Illinois Constitution because of the recent decisions of the Illinois Courts which are controlling.

4. The question whether there were factual issues in the case which deprived the Court from entering a summary judgment was fully argued in the Petition (pp. 59-62), and the comments of the Respondent do not deserve a reply.

5. We will not burden this Court with a further discussion on the point that when the Court of Appeals reversed the trial Court as to the allowance of interest from May 1, 1937, it was its duty to exclude the interest not only to the date when the action was commenced but to the date when the judgment was rendered, as this was fully covered in the Petition (p. 63).

Conclusion.

The Brief of the Respondent must be treated as a *confession* that there is no authority to support the decision in the instant case, as no authority is cited to sustain the decision which impells every investor in Trusts to the danger of personal liability for bank stock which the Trust might have purchased among other securities and which it may hold in its portfolio. *It runs counter to the principle of limited liability and undermines the whole structure of investment Trusts.* It is in the teeth of the decision of this Court in *Abbott* v. *Anderson, supra,* which *distinguished* a valid Trust from a bank-holding corporation and is *in conflict* with the Illinois decisions as well as with the decisions of other Circuits. This decision should not be allowed to stand as the law, and the Writ should be issued.

Respectfully submitted,

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